Supreme Court, U.S.
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Case No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

RAUL VIVAS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Plaintiff-Respondent.

Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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73 pp

Petitioner Raul Vivas petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTIONS PRESENTED

1. Should the United States Government be permitted to extradite an individual from a foreign country based upon an indictment in a criminal case, but try the individual on a superseding indictment charging twenty additional and different counts without first seeking permission to do so from the country from which the individual was extradited?

2. Should the district court have recused itself from imposing sentence on Petitioner under 28 U.S.C. Section 455 where it compromised its impartiality by improperly injecting itself into plea negotiations with cooperating co-defendants by threatening them to provide testimony to "convict" Petitioner and by leading them to believe that the Court would not accept their pleas and would impose the maximum sentence on them if they did not provide such testimony?

3. Should the district court have recused itself from imposing sentence on Petitioner under 28 U.S.C. § 455 where, before any evidence was introduced at trial, the district court repeatedly announced its intention to maximize the sentences that it would impose at the end of the case?

LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Raul Vivas

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PETITION FOR WRIT OF CERTIORARI

OPINIONS DELIVERED IN THE CASE

The published portion of the opinion of the United States Court of Appeals for the Ninth Circuit is reported at 29 F.3d 1432 (9th Cir. 1994), and is reprinted in the appendix hereto at 1a-17a. The unpublished portion of the opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix at 1b-24b. The decision of the United States District Court for the Central District of California is not reported.

JURISDICTION

1. On December 27, 1990, Petitioner Raul Vivas ("Petitioner") was found guilty of conspiracy and twenty counts of

laundering monetary instruments in violation of 18 U.S.C. Sections 371 and 1956(a). On August 21, 1991, Petitioner was sentenced to 505 years imprisonment.

2. On July 19, 1994, the United States Court of Appeals for the Ninth Circuit entered judgment affirming the conviction and sentencing of Petitioner.

3. On September 22, 1994, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.

4. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

TREATIES

Article 13 of the Extradition Treaty Between the United States Of America and Uruguay (April 6, 1973), provides as follows:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless ... (3) ... the requested Party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted or to his extradition to a third State provided such other offense is covered by Article 2. (App. at 1d.)

STATEMENT OF THE CASE

On February 22, 1989, Petitioner Raul Vivas was arrested in Uruguay pursuant to a request for provisional detention by the United States Embassy. On March 7, 1989, Petitioner Vivas was indicted by a federal grand jury sitting in Los Angeles for conspiracy to aid and abet the sale of

cocaine and to launder the proceeds thereof. On May 19, 1989, the Court of First Instance for Criminal and Juvenile matters in Uruguay granted the government's request for Vivas' extradition based on the original indictment. Vivas was ordered extradited on December 6, 1989.

On February 8, 1990, a Los Angeles grand jury returned a first superseding indictment charging Vivas with twenty new and different counts of laundering the proceeds of narcotics sales. The superseding indictment also varied from the original indictment in other crucial ways: (i) only five of the substantive counts in the superseding indictment — Counts 13, 14, 15, 19 and 25 — were the same as the counts charged in the original indictment; (ii) 23 of the 30 overt acts in the conspiracy counts in the superseding indictment were not in the original indictment; (iii) two of the remaining seven overt acts were expanded; (iv) 14 of the 21 overt acts in the original indictment were not contained in the superseding indictment; (v) there were numerous differences in the specific currency shipments described in the respective indictments; and (vi) there were also differences between the two indictments with respect to the entities allegedly involved in the conspiracy.

The United States never obtained and never attempted to obtain approval from Uruguay to try Vivas on the twenty new and different counts in the first superseding indictment. At oral argument before the Ninth Circuit Court of Appeals the government conceded that it could easily have sought such approval. Furthermore, the evidence that was presented to the Uruguayan courts in support of Vivas' extradition differed greatly from the evidence that was presented at his trial. In support of its request for Vivas' extradition, the United States government convinced Uruguay that it had evidence that Vivas was a drug dealer. Uruguay extradited Vivas because it believed he was a drug trafficker. At trial, however, the government introduced no

evidence or testimony that Vivas or any of the other defendants were drug dealers, saw any drug transactions, were involved in any drug transactions or were involved in an elaborate conspiracy to import cocaine into the United States.

Petitioner was tried with nine other defendants before the Honorable William D. Keller. The United States District Court for the Central District of California had jurisdiction of this case because the offenses charged arose under 18 U.S.C. Section 2, 18 U.S.C. Section 371 and 1956(a) and 21 U.S.C. Section 846. The trial lasted from May 22, 1990, to November 29, 1990. On December 27, 1990, the jury returned a verdict of guilty against Petitioner on counts 2 through 27 of the First Superseding Indictment, which included the twenty new and additional different counts that were never presented to the Uruguayan authorities for their approval. No verdict was reached on the conspiracy to aid and abet the sale of cocaine and that count was dismissed by the government at the time of sentencing.

On August 21, 1991, Petitioner was sentenced by Judge Keller to 505 years imprisonment (5 years on the conspiracy count and 20 years on each of 25 substantive money laundering counts, all terms of imprisonment to run consecutive with each other), and pay a fine of $7,580,000.

On August 30, 1991, Petitioner filed a timely Notice of Appeal. Oral argument was heard on November 1, 1993. On July 19, 1994, the United States Court of Appeals for the Ninth Circuit entered judgment in the case affirming the conviction and sentencing of Petitioner. On September 22, 1994, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The central issue in this case is whether the doctrine or rule of specialty prohibits the United States government from extraditing an individual from a foreign country based on an indictment charging certain counts, and then trying the individual on a superseding indictment charging twenty new and different counts. In the seminal case of *United States v. Rauscher*, 119 U.S. 407, 422-23, 7 S.Ct. 234, 30 L.Ed. 425 (1886), this Court held that under the doctrine of specialty, an individual *"can only be tried for the offense with which he is charged in the proceedings for his extradition,"* and for no other (emphasis added). In the instant case, Petitioner Raul Vivas was not tried "for the offense[s] with which he is charged in the proceedings for his extradition," *id.*, and the United States government did not seek or obtain permission from the surrendering country (Uruguay) to try Vivas on the new and different counts on which he was tried.

Review by this Court is necessary for two reasons. First, there is a conflict among the Second, Ninth, Tenth and District of Columbia Circuit Courts of Appeals as to the specific standard for applying the rule of specialty in cases where a defendant is extradited on one indictment but tried on a different superseding indictment. The conflicting standards in applying the doctrine of specialty are of critical legal and practical importance. First, there is no clear standard for the government and the courts to follow in cases where criminal defendants are extradited from foreign countries. Because of the uncertainty resulting from the conflict amongst the Circuits, defendants who are extradited from foreign countries do not know their rights. By this Court establishing a clear standard for district courts and courts of appeals to follow, there would be less confusion

concerning the rule of specialty and accordingly fewer appeals.

Second, the standard adopted by the Ninth Circuit below is clearly in conflict with this Court's long-standing decision in *Rauscher*. In *Rauscher*, this Court explicitly held that under the doctrine of specialty it is of "no importance" that the facts underlying the new and different offenses on which the government is seeking to try the defendant are the same as the facts underlying the offenses for which extradition was granted. The court below, however, held that Uruguay would not have objected to Vivas being tried on the twenty new and different counts because the facts underlying the new counts (for which extradition was not granted) were the same as the facts underlying the counts (for which extradition was granted). The Ninth Circuit's decision below is clearly in conflict with *Rauscher*.

Petitioner Vivas requests that this Court establish a clear rule that the doctrine of specialty requires the government to obtain explicit approval from the surrendering country that the United States can try the extradited individual on the new and different counts in the superseding indictment.

A. There is a conflict among the Circuit Courts of Appeals in applying a standard in determining whether the doctrine of specialty has been violated.

In the Second and District of Columbia Circuits the doctrine of specialty has been interpreted as requiring that "the prosecution be based on the *same facts* as those set forth in the request for extradition." *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989) (emphasis added); *Fiocconi v. Attorney General*, 462 F.2d 475, (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962). Under this analysis, the courts in the United States are to surmise whether the extraditing country would consider the acts for which the

defendant is prosecuted as independent from those for which he is extradited. *Fiocconi, supra,* 462 F.2d at 481; *Paroutian, supra,* 299 F.2d at 490-91.

For example, in *Sensi,* the defendant was extradited from Great Britain on 18 counts of theft but was tried and convicted in this country on 26 counts of mail fraud, possession or receipt of stolen securities, theft, and transportation in interstate commerce of stolen securities and money. In deciding whether the doctrine of specialty was violated, the District of Columbia Circuit stated that its task was "to determine whether the *evidence* submitted with the United States' request for extradition sufficiently established the *facts* underlying Sensi's prosecution." 879 F.2d at 896 (emphasis added). The court held that the specialty doctrine was not violated because the evidence underlying the extradition was the same as that underlying the prosecution. *Id.; see also, Kaiser v. Rutherford,* 827 F.Supp. 832, 835 (D.D.C. 1993) ("doctrine of specialty simply requires that the prosecution be based on the same facts as set forth in the request for extradition").

The Tenth Circuit applies a different standard. The Tenth Circuit holds that in applying the specialty doctrine, courts should not focus on whether the facts underlying the extradition and trial are the same, but whether the charges or offenses are the same. In *United States v. Abello-Silva,* 948 F.3d 1168, 1174 (10th Cir. 1991), Abello was extradited from Colombia to the United States under a superseding indictment charging him with two counts: conspiracy to import controlled substances and conspiracy to possess with the intent to distribute marijuana and cocaine. After extradition, a second superseding indictment was obtained charging Abello with the identical two counts set forth in the first superseding indictment, but added more facts detailing Abello's illegal activities. In holding that the specialty doctrine was not violated, the Tenth Circuit "conclude[d] the

relevant inquiry is the nature of the offenses in the two indictments *and not the different 'facts' alleged in support of the offenses." Abello-Silva, supra*, 948 F.3d at 1174, *citing United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991) (emphasis added).

The Ninth Circuit does not have a consistent position or clear standard on the doctrine of specialty. In some decisions the Ninth Circuit has required that the government seek and obtain from the surrendering country *explicit* approval that the extradited individual be tried on the specific *counts* on which he is ultimately tried. For example, in *United States v. Khan*, 993 F.2d 1368 (9th Cir. 1993), a federal grand jury in Las Vegas returned a superseding indictment charging Khan with conspiracy to import heroin in violation of 21 U.S.C. Section 963 (Count II) and use of a communication facility to facilitate the heroin conspiracy in violation of 21 U.S.C. Section 2 (Count VIII). While it was clear that Pakistan agreed to extradite Khan on Count II, it was not clear that it agreed to extradite Khan on Count VIII. In reversing Khan's conviction on Count VIII, the Ninth Circuit held:

> The opinion in *United States v. Sensi* is not dispositive. In *Sensi*, 879 F.2d at 896, the D.C. Circuit focused on the evidence submitted with the United States' request for extradition and found it sufficient to support each count of the indictment. . . .
>
> . . . *We are not convinced that the doctrine of specialty is satisfied under all treaties as long as the prosecution is based on the same facts as those set forth in the request for extradition.*
>
> Language from our opinions in *Van Cauwenberghe* and *Quinn*, "for any offense other than that for which the surrendering state agreed to extradite," suggests the need for an *affirmative statement* by the surrendering

> country of the counts upon which the extradition is based.
>
> The extradition materials do not indicate that Pakistan unambiguously agreed to extradite Khan on both Counts II and VIII. The magistrate found it persuasive that "the commissioner's report does not suggest that Khan ought not to be extradited on the charge contained in Count VIII." *But we will not infer an agreement to extradite from Pakistan's silence concerning Count VIII.*

993. F.2d at 1374 (emphasis in original and added); *see also, United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994) (citing *Khan* in holding that "[t]he specialty doctrine prevents the requesting nation from prosecuting an extradited individual for crimes other than those as to which the rendering state *explicitly* granted extradition.") (emphasis added).

The Ninth Circuit in this case, however, did not apply the standard established in *Khan* and *Fowlie*, but instead applied the standard adopted by the Second and District of Columbia Circuits. In affirming Vivas' conviction below, the Ninth Circuit, citing *Sensi, supra* (which the *Khan* court declined to follow), and *Paroutian, supra*, held that "the appropriate test for this case is 'whether the extraditing country would consider the *acts* for which the defendant was prosecuted as independent from those for which he was extradited.'" *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994). The court below refused to follow *Khan* and require the government to obtain affirmative consent from Uruguay to try Vivas on the twenty different counts in the superseding indictment. *See* 29 F.3d at 1436.

These conflicts warrant review by this Court. Presently there is no clear, uniform standard for United States Attorneys and courts to follow. If the government wishes to try an

extradited individual on a superseding indictment returned after the extradition, there is presently no clear standard for determining whether the new counts charged in the superseding indictment are the same "offenses which [the defendant] is charged in the proceedings for his extradition," *Rauscher, supra*, 119 U.S. at 421, 422-23, and 430, so that the doctrine of specialty is satisfied. Does the doctrine of specialty require that the defendant be tried only on the same counts as he was extradited, as held in *Khan* and *Fowlie*, or is the doctrine of specialty satisfied if the trial is based on the same facts as presented to the extraditing country, as held in *Sensi, Paroutian* and the Ninth Circuit in this case?

Moreover, as suggested by one of the Circuit Judges at oral argument below, a bright line rule would be appropriate and would serve to protect American citizens who are extradited to other countries.[1] Circuit Judge Trott expressed the concern that courts in this country would agree to extradite American citizens to foreign countries to stand trial on certain specified counts without any assurances that the foreign country would not try the individual on a multitude of new and different counts. (App. at 2c.) Judge Trott further expressed the concern that without a clear rule, every case involving a trial on counts different from those for which the defendant was extradited would result in an appeal on the specialty issue. (App. at 4c-5c.) Judge Trott stated that with a clear rule there would be no issue of whether or not the specialty doctrine was violated; courts would not have to inquire into whether the superseding counts arise out of the same set of facts as those on which the defendant is extradited. (App. at 7c-8c.) Judge Trott and the other panel judges in the instant case, however,

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[1]A transcription of the relevant portions the oral argument before the Court of Appeals for the Ninth Circuit is attached in the appendix at 1c-8c.

refused to follow the clear standard established in *Khan* and *Fowlie*. By refusing to follow *Khan* and *Fowlie*, the Court below instead created greater confusion.

B. The Ninth Circuit's Decision Below Conflicts with this Court's Decision In *Rauscher*.

The standard adopted by the Second and District of Columbia Circuits and the Ninth Circuit's decision in this case — which attempts to determine whether the evidence presented at the extradition hearing and at trial is the same — is clearly in conflict with this Court's decision in *Rauscher*. In *Rauscher*, this Court held that the doctrine of specialty was violated because the defendant was extradited on the charge of murder on the high seas and tried for infliction of cruel and unusual punishment. This Court specifically addressed the argument that the doctrine of specialty was not violated because evidence supporting the charge of murder was the same as the evidence supporting the charge of infliction of cruel and unusual punishment. In rejecting this argument, this Court held:

> The other observation we have to make regards an argument presented in this particular case, namely, that the prisoner was convicted on the same testimony which was produced before the magistrate who ordered his extradition. . . .
>
> *. . . [W]e are of the opinion that no importance should be attached to this matter, even if it were found that the party was convicted of inflicting cruel and unusual punishment on the seaman on the same evidence precisely upon which the committing magistrate in Great Britain delivered him up under a charge of murder.* . . . 119 U.S. at 431-32 (emphasis added).

Rauscher, therefore, is clear that a court in this country cannot presume that a court in another country will agree to extradite an individual for a different offense merely because

the evidence presented at the extradition hearing will also support the new offense charged. Yet, in affirming Vivas' conviction on the new counts charged in the superseding indictment, the Ninth Circuit examined the order authorizing Vivas' extradition which "contain[ed] a detailed recitation of Vivas' alleged crimes," and concluded that it was "confident" that Uruguay would have agreed to extradite Vivas on the twenty new counts in the superseding indictment. 29 F.3d at 1437. The Ninth Circuit ignored this Court's ruling in *Rauscher* and its decision below is clearly in conflict with *Rauscher.*

Petitioner Vivas believes that the *Khan* and *Fowlie* decisions correctly interpret *Rauscher.* Petitioner Vivas requests that this Court adopt the standard set forth in those decisions and establish a clear rule requiring the government to obtain explicit approval from the surrendering country that the United States can try the extradited individual on the new and different counts in the superseding indictment. The standard adopted by the Second and District of Columbia Circuits and the Ninth Circuit's decision in this case will have pernicious consequences. Under this standard, the United States or a foreign country can add an unlimited number of offenses to an indictment after extradition as long as those offenses are based upon the same set of facts as the offenses on which the individual was extradited. As Circuit Judge Trott pointed out at oral argument, under the government's analysis of the specialty doctrine (which was ultimately adopted by the Ninth Circuit), an American citizen could be extradited to a foreign country for committing a murder or bank robbery but could be tried for additional murders or bank robberies as long as they arise from the same set of facts. (App. at 2c and 7c.)

Finally, there is a danger in allowing courts in this country to surmise what the surrendering country would do if the facts and evidence at trial were presented at the extradition

hearing. The instant case is a good example of how the courts in this country may have incorrectly guessed what the courts in Uruguay would have done if presented with the same counts and facts that were introduced at trial. As described above, the evidence that was presented to the Uruguayan courts in support of Vivas' extradition on the original indictment differed greatly from the evidence that was presented at his trial on the superseding indictment. The United States government convinced Uruguay that it had evidence that Vivas imported cocaine into the United States, sold it, and then laundered the proceeds from the drug sales. The opinion of the Uruguayan court presiding over the extradition hearing is clear that the court agreed to extradite Vivas because it believed that the United States had evidence of narcotics sales. *See, Andonian, supra*, 29 F.3d at 1437. *The truth was that the government had no evidence that Vivas was a drug dealer.* At trial, the government introduced no evidence that Vivas or any of the other defendants were drug dealers or were involved in any drug transactions.

Given that both the charges and the facts on which Vivas was tried were different from those presented to and considered by the Uruguayan courts, it is contrary to *Rauscher* for the courts below to guess what the Uruguayan courts would have done. The only way for the courts in this country to know whether Uruguay would have extradited Vivas on the offenses charged in the superseding indictment would have been to present the superseding charges to the Uruguayan authorities. Even though at oral argument it conceded that could easily have done so, the government did not attempt to obtain permission from Uruguay to try Vivas on the counts and evidence set forth in the superseding indictment.

This Court should hold that the *Khan* and *Fowlie* interpretation of *Rauscher* is correct and hold that the doctrine of specialty requires that if the government wishes to try an

extradited individual on counts in a superseding indictment which are different from those in the indictment on which the extradition was based, the government is required to obtain an affirmative statement by the surrendering country that it is permissible for the United States government to do so.

PETITIONER RAUL VIVAS JOINS IN THE CONCURRENTLY FILED JOINT PETITION FOR WRIT OF CERTIORARI OF PETITIONERS VAHE AND NAZARETH ANDONIAN

Pursuant to Rule 12.2 of the Supreme Court Rules, Petitioner Raul Vivas hereby joins in the concurrently filed Petition for Writ of Certiorari filed by Petitioners Vahe Andonian and Nazareth Andonian.

Petitioners Vahe Andonian and Nazareth Andonian were convicted in the same judgment as Petitioner Raul Vivas and were also sentenced to 505 years imprisonment. In their Joint Petition, Petitioners Vahe Andonian and Nazareth Andonian seek review by this Court on two issues:

1. Whether the district court should have recused itself from imposing sentence on Petitioners under 28 U.S.C. Section 455 where it compromised its impartiality by improperly injecting itself into plea negotiations with cooperating co-defendants by threatening them to provide testimony to "convict" Petitioner and by leading them to believe that the Court would not accept their pleas and would impose the maximum sentence on them if they did not provide such testimony.

2. Whether the district court should have recused itself from imposing sentence on Petitioners under 28 U.S.C. Section 455 where, before any evidence was introduced at trial, the district court repeatedly an-

nounced its intention to maximize the sentences that it would impose at the end of the case.

The fact that the district court imposed maximum sentences of 505 years, as it said it would prior to hearing any evidence, shows that it lacked impartiality required of district courts under 28 U.S.C. Section 455. The district court's lack of impartiality foreclosed the opportunity for Petitioners to have a fair trial and sentencing.

CONCLUSION

For the foregoing reasons, Petitioner Vivas respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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FOR PUBLICATION

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91-50625
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D.C. No.
CR-89-0190-WDK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NAZARETH ANDONIAN, VAHE ANDONIAN,
RUBEN SAINI, RAUL VIVAS, and
JUAN CARLOS SERESI,
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted November 1, 1993
Submission deferred December 23, 1993
Resubmitted February 9, 1994

Filed July 19, 1994

Before: James R. Browning, Robert R. Beezer, and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Criminal Law and Procedure/Extradition/ International Law

The court of appeals affirmed a district court judgment of conviction. The court held that a trial of a defendant on a superseding indictment returned after his extradition, did not violate the doctrine of specialty, even though the superseding indictment alleged additional counts of an offense.

Appellants Raul Vivas, Juan Carlos Seresi, Vahe Andonian, Nazareth Andonian, and Ruben Saini were charged with conspiracy to launder money and individual acts of money laundering. At the request of the United States, Uruguay extradited Vivas on the original indictment in the case. After Vivas was extradited, the grand jury returned a superseding indictment, which alleged additional substantive counts of money laundering, contained a greater number of alleged overt acts in furtherance of the conspiracy, and described Vivas' alleged role in the conspiracy with more detail. Vivas was tried on the superseding indictment and convicted of various counts.

Vivas appealed his conviction, contending that his trial on the superseding indictment violated the doctrine of specialty, because the indictment that formed the basis of his extradition contained fewer counts and alleged a conspiracy of narrower scope than the superseding indictment. Vivas argued that prosecution on the superseding indictment violates the doctrine absent an affirmative statement from the surrendering country authorizing trial on each count in the superseding indictment.

[1] The doctrine of specialty prohibits a requesting nation from prosecuting an extradited individual for an offense other than that for which the surrendering state agreed to extradite. [2] An extradited person, however, can be tried for a crime other than that for which he was surrendered, if

the asylum country consents. [3] The appropriate test in this case was whether the extraditing country would consider the acts for which the defendant was prosecuted as "independent" from those for which the defendant was extradited.

[4] In this case, the offenses alleged in the superseding indictment did not constitute "separate offenses" as that term is used in the context of the doctrine of specialty. [5] There was no dispute that money laundering is an extraditable offense under the treaty under which Vivas was extradited, or that Uruguay agreed to extradite Vivas on charges of money laundering. [6] Uruguay would not regard Vivas' prosecution for the additional counts of money laundering as a breach of the treaty. The order authorizing Vivas' extradition contained a detailed recitation of Vivas' alleged crimes, and it specifically acknowledged extradition for trial on charges of money laundering.

[7] The superseding indictment altered neither the nature of the scheme alleged nor the particular offenses alleged. The only significant difference between the two documents was that the superseding indictment was more specific in its description of the scheme and contained added substantive counts of money laundering. The additional substantive counts were identical to those alleged in the original indictment. Under the circumstances, Uruguay would not consider the additional acts to be independent from those for which Vivas was extradited.

[8] In addition, the government was not required, under the auspices of specialty, to try Vivas on the same *evidence* that was presented to the surrendering state, so long as it satisfied the requirement that trial was for the same offenses arising out of the same allegations of fact.

COUNSEL

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Jean Kawahara, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

BEEZER, Circuit Judge:

The defendants appeal their jury convictions and sentences for conspiracy to commit money laundering and for money laundering in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(A)(i) and (B)(i). The government alleged the defendants organized and operated a vast and elaborate money laundering network, known by its participants as "La Mina," which laundered cash drug proceeds by purchasing, trading, and selling gold and then wire-transferring the funds out of the country. Over a three-year period, approximately $316 million were funneled to banks in Central and South America.

Raul Vivas, Juan Carlos Seresi, Vahe Andonian, and Nazareth Andonian were convicted of conspiracy to launder money (Count 2) and of individual acts of money laundering alleged in Counts 3-27. Ruben Saini was convicted of conspiracy to launder money (Count 2) and of individual acts of money laundering alleged in Counts 6-27. Saini was acquitted of money laundering alleged in Counts 3-5. None of the defendants was convicted on Count 1, which alleged conspiracy to aid and abet the possession and distribution of

cocaine, in violation of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 2.

Vivas, Seresi, and the Andonians were each sentenced to 505 years in prison. Saini was sentenced to 27 years in prison.

The defendants appeal their convictions and sentences. They assign various errors to pretrial and trial proceedings and to their sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

I

At the request of the United States, Uruguay extradited Vivas on the original indictment in this case. After Vivas had been extradited, the grand jury returned the superseding indictment on which Vivas was ultimately tried. In a pretrial motion, Vivas challenged the district court's jurisdiction to try him on the superseding indictment. The district court denied the motion, and Vivas appealed. We dismissed the appeal on the basis that the order was neither final nor subject to interlocutory appeal. *United States v. Vivas,* No. 90-50182 (9th Cir. 1990).

Vivas argues that his trial on the superseding indictment violated the doctrine of specialty, because the indictment that formed the basis of his extradition contained fewer counts and alleged a conspiracy of narrower scope than the superseding indictment. The original indictment alleged in Count 1 conspiracy to aid and abet in the possession and distribution of cocaine and to launder money. The substantive money laundering counts against Vivas appeared in two

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[1]Because we here address only Vivas' argument that his trial on the superseding indictment violated the doctrine of specialty, we consider the remaining issues related to the trial and sentences in a separate memorandum disposition.

groups. Counts 2-7 alleged individual substantive counts of money laundering in the form of shipping currency from New York, New York, to Los Angeles, California, on several dates between November 14, 1988 and December 12, 1988. Counts 8-12 alleged individual substantive counts of money laundering in the form of depositing currency into bank accounts in Los Angeles between November 15, 1988 and December 14, 1988.

The superseding indictment alleges the drug conspiracy in Count 1 and the money laundering conspiracy in Count 2. As in the original indictment, the substantive counts of money laundering appear in two groups. Counts 3-16 allege individual substantive counts of money laundering in the form of shipping currency from New York to Los Angeles on several dates between June 3, 1988 and December 12, 1988. Counts 13, 14, and 15 are identical to Counts 4, 6, and 7 in the original indictment. The remaining counts in this group (3-11, 12, and 16) are new, and three counts from the original indictment (2, 3, and 5) do not appear in the superseding indictment. Counts 17-27 of the superseding indictment allege substantive counts of money laundering in the form of depositing currency into bank accounts in Los Angeles between October 27, 1988 and December 20, 1988. Counts 19 and 25 are identical to Counts 10 and 12 of the original indictment. Nine of the remaining counts in this group (17, 18, 20-24, 26, and 27) are new, and three of the counts from the original indictment (8, 9, and 11) do not appear in the superseding indictment.

The superseding indictment also contains a greater number of alleged overt acts in furtherance of the conspiracy which roughly parallel the added substantive counts of money laundering. Vivas' alleged role in the conspiracy is described in more detail in the superseding indictment, with allegations that Vivas implemented the scheme to collect the currency proceeds of cocaine sales, use the proceeds to

purchase gold, wire-transfer the proceeds from the gold to Uruguay, and then distribute the funds to cocaine traffickers and money launderers in Colombia.

II

We review de novo the district court's determination that the prosecution on the superseding indictment did not violate the doctrine of specialty. *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993).

[1] "The doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). The doctrine is based on principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States. *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). Our concern is with ensuring that the obligations of the requesting nation are satisfied. *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986). "Because of this, the protection exists only to the extent that the surrendering country wishes." *Id.* An extradited person may raise whatever objections the extraditing country is entitled to raise. *Cuevas*, 847 F.2d at 1426; *Najohn*, 785 F.2d at 1422.

[2] We look to the language of the applicable treaty to determine the protection an extradited person is afforded under the doctrine of specialty. The treaty with Uruguay, pursuant to which Vivas was extradited, provides:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for

> which extradition has been granted . . . unless . . . the requested Party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted . . . .

Treaty on Extradition and Cooperation in Penal Matters, April 6, 1973, U.S.-Uru., art. 13, T.I.A.S. No. 10850 at 17-18 [hereinafter "Treaty"]. An extradited person, in any case, " 'may be tried for a crime other than that for which he was surrendered, *if the asylum country consents.*' " *Najohn*, 785 F.2d at 1422 (quoting *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979) (emphasis in original)).

III

Vivas argues that the doctrine of specialty was violated in two respects: first, he was not tried on the offenses for which he was extradited; and second, he was not tried on the facts that were presented to the Uruguay court.

A

Our prior decisions do not directly address the impact of the doctrine of specialty in a case involving a superseding indictment returned after the defendant has been extradited and alleging additional counts of the same substantive offense. Vivas urges us to hold that prosecution on a superseding indictment violates the doctrine absent an affirmative statement from the surrendering country authorizing trial on each count in the superseding indictment

[3] We agree with the government that the appropriate test for this case is "whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited." *Cuevas*, 847 F.2d at 1428 (citing *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962)). The order of extradition at issue in *Cuevas* specifically authorized trial on a fifteen-

count indictment alleging narcotics and money laundering violations. Appended to the order, however, was an ambiguous injunction referring to the "fiscal aspect[s]" of the case. We concluded that the doctrine of specialty was not violated by trial on all fifteen counts, because the extraditing country's court had acknowledged the integral relationship between the narcotics charges and the currency reporting charges. *Id.; see also United States v. Sensi*, 879 F.2d 888, 895-96 (D.C. Cir. 1989) (applying test of "whether the requested state has objected or would object to prosecution" for the offenses).

Although it did not involve a superseding indictment, the approach of *Cuevas* applies to the situation presented here. In *Cuevas* we relied on *Paroutian*, in which the Second Circuit rejected a specialty challenge to the defendant's trial on an indictment other than that for which he was extradited. *Paroutian*, 299 F.2d at 490-91. Both indictments in *Paroutian* contained charges of narcotics trafficking, but the later indictment, issued in another district, included two counts not covered in the indictment forming the basis for extradition from Lebanon. *Id.* The court reasoned that "the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate.' " *Id.* Although the court agreed that trial on "some other offense totally unrelated to the traffic in narcotics" would violate the doctrine of specialty, the court concluded that additional narcotics trafficking charges would not have been considered separate offenses by the surrendering country. *Id.*

Similarly, in *Fiocconi v. Attorney General*, 462 F.2d 475, 481 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), the court held that trial on a superseding indictment adding offenses subsequent to those alleged in the original indictment did not violate the doctrine of specialty. The court explained

that, "in the absence of any affirmative protest from [the surrendering country], we do not believe that Government would regard the prosecution of [defendants] for subsequent offenses of the same character as the crime for which they were extradited as a breach of faith by the United States." *Id.*

[4] In the instant case, the offenses alleged in the superseding indictment do not constitute "separate offenses" as that term is used in the context of the doctrine of specialty. Vivas nevertheless urges us to hold that the government was required to present the superseding indictment to the government of Uruguay and to obtain its affirmative consent to his trial. Vivas relies on our statement in *Khan*, 993 F.2d at 1374, that "[l]anguage from our opinions in *Van Cauwenberghe* [827 F.2d at 428] and [*Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986)], 'for any offense other than that for which the surrendering state agreed to extradite,' suggests the need for an affirmative statement by the surrendering country of the counts upon which the extradition is based." We held in *Khan* that "we will not infer an agreement to extradite from [the surrendering country's] silence . . . ." *Id.*

Vivas argues that *Khan* bars his prosecution on any *count*, as opposed to any *offense*, for which extradition was not expressly authorized by Uruguay. We reject this broad reading of the word "count" as it is used in *Khan*. Khan was extradited from Pakistan to stand trial for conspiracy to import heroin and for using a telephone to facilitate the conspiracy (Count VII). Khan argued that prosecution on Count VII violated the doctrine of specialty. Although the facts presented to Pakistan encompassed the count, the Pakistani commissioner's report had not once referred to the violation alleged in Count VII or to its statutory predicate. In holding that Pakistan's silence was dispositive, we noted that "[w]e presume, without evidence to the contrary, that

Pakistan would object to extradition on the basis of Count VII because the offense charged there is not a crime in Pakistan." *Id.* at 1374 n.5.

Khan's reliance on *United States v. Rauscher*, 119 U.S. 407 (1886) and *United States v. Merit*, 962 F.2d 917 (9th Cir.), *cert. denied*, 113 S. Ct. 244 (1992), bolsters our conclusion that its "affirmative statement" standard applies primarily to a class of cases in which an ambiguous extradition order creates a risk that a defendant will be prosecuted for an offense which is unrecognized in the surrendering country. In Rauscher, for example, the Supreme Court held that a defendant extradited on a charge of murder could not be tried on the lesser charge of cruel and unusual punishment. *Rauscher*, 119 U.S. at 421, 430-32. The Court explained that

> as the treaty only justified his delivery on the ground that he was proved to be guilty of murder before the committing magistrate, it does not follow at all that such magistrate would have delivered him on a charge, founded upon precisely the same evidence, of inflicting cruel and unusual punishment, an offence for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder.

Id. at 432; *see also Merit*, 962 F.2d at 923 (affirming conviction on two counts where extradition order was silent as to other counts and where, after request for clarification, surrendering state had confirmed that defendant was extradited on only those two counts).

[5] *Khan* is, for this reason, inapposite on its facts. There is no dispute here that money laundering is an extraditable offense under the Treaty, or that Uruguay agreed to extradite Vivas on charges of money laundering.

[6] Our concern is with whether Uruguay would regard Vivas' prosecution for the additional counts of money laundering as a breach of the Treaty. We are confident Uruguay would not. The order authorizing Vivas' extradition contains a detailed recitation of Vivas' alleged crimes:

> As part of the entire drug trafficking operation, Vivas and some of his codefendants coordinated the collection of the proceeds from cocaine sales from the distributors in Los Angeles, California; New York, New York, and other places within the United States. Once the money was collected, Vivas and others supervised its transfer and deposit into bank accounts controlled by them in Los Angeles, whence it was transferred by wire or by cable to accounts in New York and Uruguay, for its ultimate distribution to the cocaine traffickers in Colombia.
>
> . . . The specific counts against Vivas include that in 1986 he purchased a money exchange and precious metals business in Montevideo, Uruguay, called Cambio Italia or Letras S.A., which he used for the benefit of the drug traffickers for whom he worked, as a means of disguising the true origin of the large amounts of money transferred to them from the United States. Using Cambio Italia and other businesses in the United States, it is alleged that Vivas and his codefendants would devote themselves to making fictitious sales of gold, which was exchanged for the money that had been collected by the cocaine distributors. . . . The evidence on which the counts against Vivas are based further indicates that hundreds of millions of dollars worth of illegal drug proceeds were transferred to the accounts belonging to Vivases [sic] businesses in Uruguay and were later remitted to Panama, Colombia or other places, on behalf of the cocaine traffickers.

Order of May 19, 1989, Second Office of Legal Court of First Instance for Criminal and Juvenile Matters, Maldonado, at 3-4. The Uruguay Court further noted that "the extradition treaties must always be interpreted in the light most favorable to the purpose for which they were created." *Id.* at II. The Order specifically acknowledges extradition for trial on charges of money laundering. *Id.* at 18, 20.

[7] The superseding indictment altered neither the nature of the scheme alleged nor the particular offenses alleged. The only significant difference between the two documents is that the superseding indictment is more specific in its description of the scheme and contains added substantive counts of money laundering.[2] Significantly, these additional substantive counts are identical to those alleged in the original indictment. The original indictment alleges instances of money laundering in the form of currency shipments from New York to Los Angeles and in the form of deposits to Los Angeles bank accounts; the superseding indictment alleges a greater number of such shipments and deposits conducted in exactly the same manner. We conclude that, under the circumstances of this case, Uruguay would not consider these additional acts to be independent from those for which Vivas was extradited.

B

Vivas argues that the doctrine of specialty was further violated because he was not tried on the same facts as those presented to the government of Uruguay. Specifically, he asserts that the United States convinced Uruguay with

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[2]The suggestion that the *omission* of substantive counts of money laundering from the superseding indictment violates the doctrine of specialty lacks merit. *Rauscher* protects an extradited defendant only from being tried on a wholly different offense than that for which extradition is granted. It does not protect a defendant from being tried on fewer counts of the same offense.

insufficient and false evidence that Vivas was involved in drug trafficking and that the United States then tried him on different evidence.

The doctrine of specialty has been interpreted as requiring that "the prosecution be based on the same facts as those set forth in the request for extradition." *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C. Cir. 1989) (quotation omitted). The defendant in *Sensi* argued that he could not be tried on a 26-count indictment naming offenses that had not been listed before the magistrate of the surrendering country. The court found that the language of the treaty required that the charges against the defendant be established " 'by the facts in respect of which his extradition [was] granted.' " Id. at 896 (quoting the relevant treaty).

Here, the Treaty provides:

> The requested Party may require the requesting Party to produce evidence to establish probable cause that the person claimed has committed the offense for which extradition is requested. The requested Party may refuse the extradition request if an examination of the case in question shows that the warrant is manifestly ill-founded.

Treaty, art. 10, T.I.A.S. No. 10850, at 14.

Vivas argues that, because there was insufficient evidence presented at trial to establish his guilt, there was insufficient evidence to extradite him. Even if we agreed that there was insufficient evidence to establish Vivas' guilt, which we do not, this argument would fail. First, the Treaty provides only that the United States may be required to establish probable cause to warrant extradition. The government need not prove its case beyond a reasonable doubt to the Uruguay authorities. Because Vivas may raise only those objections which Uruguay is entitled to raise, he cannot object to extradition on the basis the offenses for which he was

charged were not established beyond a reasonable doubt to Uruguay.

The government attempted, through substantial circumstantial evidence, to prove that Vivas was involved in a conspiracy related to cocaine trafficking. Both the original indictment, which was presented to Uruguay, and the superseding indictment allege Vivas' involvement in such a conspiracy. His acquittal on Count 1 of the indictment demonstrates only that the government failed to prove beyond a reasonable doubt that Vivas was a member of a conspiracy to aid and abet cocaine distribution. The acquittal says nothing about whether there was sufficient evidence for Uruguay to find probable cause to warrant extradition.

[8] Second, we note that the doctrine of specialty "has never been construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state, as distinguished from limiting the jurisdiction of domestic courts to try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited." *United States v. Thirion*, 813 F.2d 146, 153 (8th Cir. 1987) (quotations omitted). The doctrine of specialty is satisfied if the extraditing country honors the limitations placed on the prosecution by the surrendering state. *See Cuevas*, 847 F.2d at 1426. The government is not required, under the auspices of specialty, to try a defendant on the same *evidence* that was presented to the surrendering state, so long as it satisfies the requirement that trial is for the same offenses arising out of the same allegations of fact.

Vivas also asserts that the evidence presented to Uruguay was false. The government provided to Uruguay the sworn declaration of a cooperating witness, Sergio Hochman, stating that Vivas was laundering money for Colombian drug traffickers. At trial, however, Hochman testified that he overheard a conversation in which Vivas stated "that he didn't want to have anything to do with drugs." We are

unpersuaded that the government's failure (or inability) to introduce Hochman's declaration at trial has any bearing on its veracity. Even if Hochman's trial testimony may be construed as contradicting his declaration, a construction we do not here adopt, we cannot agree that Hochman's testimony shows that his declaration was false.

For the reasons stated here and in our separate unpublished disposition, Vivas' conviction is affirmed.

AFFIRMED.

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NOT FOR PUBLICATION

Nos. 91-50622, 91-50623
91-50624, 91-50625
91-50626
D.C. No.
CR-89-0190-WDK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NAZARETH ANDONIAN,
VAHE ANDONIAN, RUBEN SAINI,
RAUL VIVAS, and JUAN CARLOS SERESI,
Defendants-Appellants.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted November 1, 1993
Submission deferred December 23, 1993
Resubmitted February 9, 1994
Pasadena, California

FILED: July 19, 1994, Cathy A. Catterson, Clerk,
U.S. Court of Appeals

Before: BROWNING, BEEZER, and TROTT, Circuit Judges

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The defendants appeal their jury convictions and sentences for conspiracy to commit money laundering and for money laundering in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(A)(i) and (B)(i). The government alleged the defendants organized and operated a vast and elaborate money laundering network, known by its participants as "La Mina," which laundered cash drug proceeds by purchasing, trading, and selling gold and then wire-transferring the funds out of the country. Over a three-year period, approximately $316 million were funneled to banks in Central and South America.

Raul Vivas, Juan Carlos Seresi, Ruben Saini, and Vahe and Nazareth Andonian were convicted on Count 2, which alleged conspiracy to launder money. Vivas, Seresi, and the Andonians were also convicted of individual acts of money laundering alleged in Counts 3-27. Ruben Saini was convicted of individual acts of money laundering alleged in Counts 6-27 and acquitted of money laundering alleged in Counts 3-5. None of the defendants were convicted on Count 1, which alleged conspiracy to aid and abet the possession and distribution of cocaine, in violation of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 2.

Vivas, Seresi, and the Andonians were each sentenced to 505 years in prison. Saini was sentenced to 27 years in prison.

The defendants appeal their convictions and sentences. They assign various errors to pretrial and trial proceedings and to their sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the convictions.[1] We affirm the sentences of Vivas and the Andonians. We remand for

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[1]We have addressed Vivas' argument that his trial on the superseding indictment violated the doctrine of specialty in a separate opinion. Here, we consider the remaining issues related to the trial and sentences.

reconsideration and further findings as to the sentences of Seresi and Saini.

I

The money laundering scheme involved in this case is complex. We do not attempt here to summarize the picture which unfolded in eight months of testimony. Because the details are familiar to the parties, we need not here summarize the facts.

II

Defendants Seresi and Saini contend that they were denied their rights under the Speedy Trial Act, 18 U.S.C. § 3161. The Act requires that trial begin within 70 days of the filing of the indictment, unless there is excludable delay under 18 U.S.C. § 3161(h). Seresi and Saini argue that the periods of delay from January 23, 1990 to March 20, 1990, and from March 20, 1990 to April 17, 1990 were not excludable. They also contend that the government did not exercise due diligence in preparing for trial.

We review the district court's factual findings for clear error and its conclusions of law de novo. *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir.), *cert. denied*, 114 S. Ct. 250 (1993). Defendant's contentions have no merit.

The district court found excludable delay based on the "ends of justice," until March 20, 1990. As Vivas had been arraigned only days earlier, the district court found that he was entitled to adequate time to prepare for trial. The district court ordered a further continuance on March 1, 1990, setting trial for April 17, finding the delay excludable both to preserve continuity of counsel for the government and to provide Vivas with additional time to prepare for trial by investigating certain potential witnesses who were in South America.

The district court's findings were not clearly erroneous. Although the prosecutor's estimate of the time needed for another case were overly optimistic, we cannot say the district court clearly erred in determining that the government had acted with due diligence and was entitled to continuity of counsel. *See* 18 U.S.C. § 3161(h)(8)(B)(iv).

Further, Seresi and Saini cannot complain that the continuances were not excludable to the extent they were granted to allow Vivas to prepare for trial. A continuance granted to one non-severed defendant applies to all. *Butz,* 982 F.2d at 1381. Vivas was entitled to a fair opportunity to prepare for trial. *United States v. Calabrese*, 825 F.2d 1342, 1347 (9th Cir. 1987).

III

Vivas, Seresi, and Saini argue that the district court erred in admitting evidence of other acts under Fed. R. Evid. 404(b). They argue that the district court failed to analyze whether the prior conduct was admitted to prove a material fact, that the government failed to enunciate a specific purpose for admitting the evidence, that the district court failed to weigh the probative value against the prejudicial effect of the evidence, and that the district court failed to properly instruct the jury concerning the evidence.

The challenged evidence concerns Vivas', Seresi's, and Saini's relationship with Wanis Koyomejian and the Ropex company. It demonstrated that the money laundering methods employed prior to 1987 by Vivas, Seresi, and Saini were similar to the methods employed after the arrangement with the Andonians was established.

Whether the challenged evidence is "other crimes" or prior similar act evidence under Rule 404(b) is a question of law we review de novo. *United States v. Hill*, 953 F.2d 452, 455 (9th Cir. 1991). We reverse a district court's admission

of evidence under Rule 404(b) only for clear abuse of discretion. *United States v. Miller*, 874 F.2d 1255, 1268 (9th Cir. 1989).

A

Rule 404(b) permits introduction of evidence to prove a person's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We have consistently held that "the rule is one of inclusion and that other acts evidence is admissible whenever relevant to an issue other than the defendant's criminal propensity." *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982).

Defendants argue that the district court failed to analyze whether the other acts evidence was introduced to prove a material element of the charged offense. *See United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). The government may not use evidence of other wrongs unless it establishes that "the evidence is probative of a material issue in the case, and that sufficient evidence exists for the jury to find that the defendant committed the other acts." *United States v. Ramirez-Jimenez*, 967 F.2d 1321, 1325 (9th Cir. 1992).

Evidence of prior related activities is admissible under Rule 404(b) "so long as the acts tended to make the existence of [the defendant's) knowledge or intent more probable than it would be without the evidence." *United States v. Jones*, No. 90-10501, slip op. at 3335 (9th Cir. April 6, 1993).[2] In *Jones*, we held that evidence that the defendant was involved in an earlier drug importation operation was relevant to establishing his involvement in the

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[2]We cite the slip opinion here because West Publishing failed to include the entire opinion in the bound volume in which Jones appears. See Jones, 982 F.2d 380 (9th Cir. 1993).

charged conspiracy: "[I]n light of the similarity in the modus operandi . . . the testimony was relevant as tending to show that appellant had the requisite knowledge and intent to commit the crimes with which he was charged." *Id.* at 3336.

The same logic applies here. The modus operandi of the alleged money laundering scheme was identical to that of the scheme established by the Rule 404(b) evidence involving Vivas, Seresi, and Saini and the Ropex company. The evidence tends to show both knowledge and intent, which are elements of money laundering. The evidence of Vivas', Seresi's, and Saini's prior relationship also tends to establish the association and plan elements of conspiracy. The district court did not abuse its discretion in admitting the Rule 404(b) evidence to prove material elements of money laundering.

B

The defendants also argue that the government failed to enunciate a specific purpose for admitting the other acts evidence. In demonstrating that Rule 404(b) evidence is relevant, the government must " 'articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence.' " *United States v. Brooke*, 4 F.3d 1480, 1483 (9th Cir. 1993) (quoting *Mehrmanesh*, 689 F.2d at 830).

The defendants' argument focuses on the government's and the district court's failure to specify on which of the bases under Rule 404(b) the evidence was being offered and admitted. The government relied on all of the possible grounds for admission of the evidence listed in Rule 404(b). We will not reverse on this basis. *See Mehrmanesh*, 689 F.2d at 830-31.

C

The defendants also argue that the district court failed to balance properly the probative value against the prejudicial effect of the evidence under Rule 403. We reject this argument.

Once it has been established that the other acts evidence is relevant, "the evidence is admissible only after the Government demonstrates to the trial court that, on balance, its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant." *Mehrmanesh*, 689 F.2d at 830.

The district court heard extensive argument on the admissibility of the Rule 404(b) evidence, including argument related to its probative value and possible prejudicial effect. Even in the absence of a specific finding that the probative value outweighed the prejudicial effect of the evidence, "we will uphold admission of the evidence when it is clear from the record that the court implicitly made the necessary finding." *Ramirez-Jimenez*, 967 F.2d at 1326.

A finding that unfair prejudice was outweighed by the probative value of the evidence was justified in this case. Probative value is measured by the tendency of the evidence to make the existence of Vivas', Seresi's, and Saini's knowledge or intent more probable than it would be without the evidence. *id.* at 1327. Unfair prejudice is measured by "the extent to which the testimony 'makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.'" *Id.* (quoting *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982)). Evidence related to these defendants' activities involving Ropex prior to their involvement with the Andonians was highly probative of their knowledge, intent, preparation, and

plan. There is little about this evidence, however, that would be emotionally provocative to the jury. We agree with the district court that the probative value of the evidence outweighed its prejudicial effect.

D

Third, Vivas, Seresi, and Saini assail the district court's instructions to the jury related to the Rule 404(b) evidence. They contend the instructions were defective because they merely parroted the Rule without identifying the particular basis for which the evidence could be considered. They also argue that the instructions were perfunctory and did not guide the jury. Vivas argues that the instructions unfairly focused attention on him and that the district court's use of the word "against" in the instructions was prejudicial.

When Rule 404(b) evidence is admitted, the district court "should ordinarily instruct the jury carefully as to the limited purpose for which the evidence was admitted." *United States v. Bradshaw,* 690 F.2d 704, 709 (9th Cir. 1982), *cert. denied,* 463 U.S. 1210 (1983). We hold that the district court did not abuse its discretion in delivering its limiting instructions to the jury. Although the instructions could have been more carefully tailored, we conclude the defendants were not denied a fair trial as a result of the instructions. *Cf. Bradshaw,* 690 F.2d at 709. The district court's failure to articulate precisely the bases on which the evidence was admitted caused no prejudice, because the evidence was admissible on most, if not all, of the asserted grounds. Nor did the district court's failure to identify Vivas, Seresi, and Saini individually with each instruction cause prejudice. Because the Rule 404(b) evidence was admitted, on each occasion, for consideration with respect to only these three defendants, it is reasonable to presume that the jury did not need constant repetition of their names, so long as the jury was informed generally that the evidence admit-

ted was for the limited purpose previously identified by the district court.

Vivas' assertion that the jury instructions unduly focused attention on him is without merit. We reject the argument that the use of the word "against" in the district court's instructions led the jury to believe that all of the Rule 404(b) evidence demonstrated guilt. *See United States v. Restrepo,* 884 F.2d 1294, 1296-97 (9th Cir. 1989).

IV

The defendants argue that there was a prejudicial variance between the conspiracy charged and the conspiracy proved at trial. A variance occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment. *United States v. Van Stoll,* 726 F.2d 584, 586 (9th Cir. 1984). "A variance between indictment and proof does not require reversal unless it affects the substantial rights of the parties." *United States v. Kaiser,* 660 F.2d 724, 730 (9th Cir. 1981), cert. denied, 455 U.S. 956 (1982).

A

Because the asserted variance relates to a conspiracy charge, we must determine whether the single conspiracy charged has been proved. *United States v. Bibbero,* 749 F.2d 581, 586 (9th Cir. 1984), *cert. denied,* 471 U.S. 1103 (1985). The question of whether a single conspiracy has been proved is essentially a question of the sufficiency of the evidence. *Id.* The evidence is sufficient if " 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* at 586-87 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

We apply a "factors" analysis to distinguish multiple from single conspiracies. *Bibbero,* 749 F.2d at 587. "The relevant

factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *Id.* A single conspiracy may be identified either by isolating various elements under this factors analysis, or by aggregating the evidence under the general test of whether there was a single overall conspiracy. *United States v. Zemek,* 634 F.2d 1159, 1167-68 (9th Cir. 1980), *cert. denied,* 450 U.S. 916, and 450 U.S. 985, and 452 U.S. 905 (1981). The evidence need not exclude every hypothesis but that of a single conspiracy; rather it is enough that it adequately supports a finding that a single conspiracy existed. *United States v. Kenny,* 645 F.2d 1323, 1335 (9th Cir.) , *cert. denied,* 452 U.S. 920 (1981)

The defendants argue that although the indictment alleged a conspiracy between Vivas, Seresi, Saini, and the Andonians, the evidence at trial proved a larger conspiracy involving the defendants and activities in the *Koyomejian* indictment. We disagree.

We note first that the evidence related to the *Koyomejian* case was admitted under Fed. R. Evid. 404(b) as evidence of other crimes or acts committed by defendants Vivas, Seresi, and Saini. Regardless of the inconsistencies in the government's assertions before the district court, the decision to charge the Andonian conspiracy separately from the *Koyomejian* conspiracy is supported by the record. We do not require that the evidence exclude every hypothesis other than that of a single conspiracy. It is enough that the evidence be sufficient to allow a rational jury to find the single conspiracy alleged in the indictment.

We have no difficulty concluding that the evidence was sufficient to allow the jury to find that the single conspiracy alleged in the indictment existed. The nature of the scheme, the quality and frequency of transactions, and the commonality of time and goals all tend to show that the defendants

were members of a single conspiracy. That Vivas, Seresi, and Saini had been, and continued to be, involved in the strikingly similar conspiracy alleged in the *Koyomejian* indictment does not alter our analysis of whether the conspiracy alleged here existed.

As to the Andonians, evidence establishing events prior to their joining the conspiracy does not constitute an impermissible variance. *See, e.g., Bibbero,* 749 F.2d at 588; *United States v. Morse,* 785 F.2d 771, 775 (9th Cir.), *cert. denied,* 476 U.S. 1186, 479 U.S. 861 (1986); *United States v. Little,* 753 F.2d 1420, 144-849 (9th Cir. 1984).

B

Even if they established a variance, defendants are entitled to reversal only if their substantial rights are prejudiced. *Morse,* 785 F.2d at 775. Defendants contend that they were deprived of the right to trial on the charges presented to a grand jury, because the Rule 404(b) evidence dominated the trial. *See id.*

We reject this claim as nothing more than a restatement of the argument that the Rule 404(b) evidence should not have been admitted. Nor do we agree that the Rule 404(b) evidence dominated the trial.[3] More importantly, the evidence did not materially alter the charge in the indictment. Although the evidence of other crimes and acts contributed to the government's case that vivas, Seresi, and

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[3]Defense counsel estimated that the Rule 404(b) evidence constituted five to ten percent of that adduced at trial. While we need not adopt this assessment, we conclude that it is insufficient to establish that evidence of other crimes so dominated a trial as to result in a prejudicial variance. we similarly reject the assertion that because defendant objected to the admission of Rule 404(b) evidence approximately 86 times over an eight-month period, they have made out a claim of prejudicial variance.

Saini were members of a conspiracy, it did not rise to the level of altering the conspiracy charged in the indictment.

V

The defendants argue that the district court should have severed the trials. We review for abuse of discretion the district court's denial of a motion to sever. *United States v. Tootick*, 952 F.2d 1078, 1080 (9th Cir. 1991).

Vivas argues that his trial should have been severed from that of all the other defendants; Seresi and Saini argue that their trial should have been severed from that of Vivas and the Andonians; and the Andonians argue that their trial should have been severed from that of Seresi, Saini, and Vivas. All of the defendants base their arguments on two general theories: (1) that the jury could not be relied upon to compartmentalize the evidence against individual defendants; and (2) that the defendants presented mutually antagonistic defenses.

A defendant may be prejudiced by "spillover" of incriminating evidence. *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.) *cert. denied*, 449 U.S. 856 (1980). We have identified two critical compartmentalization issues: (1) whether the district court diligently instructed the jury on the purposes to which various strands of evidence may be put, and (2) whether the jury rendered selective verdicts indicating its ability to compartmentalize. *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir.) (quotations and citations omitted), *cert. denied*, 113 S. Ct. 475 (1992).

We reject the assertion that the jury failed to compartmentalize. The district court instructed the jury as to the limited admissibility of certain evidence. The jury returned selective verdicts indicating that it found different levels of intent with respect to Vivas and Seresi and acquitting four other defendants.

Severance is also mandated if defendants present mutually antagonistic defenses. *Tootick*, 952 F.2d at 1081. Mutual inconsistency is not enough; rather, defendants must show that "acquittal of one codefendant would necessarily call for the conviction of the other." *Id.* at 1081. We find no merit in defendants' claims that their defenses were mutually antagonistic. The defense of Seresi and Saini differed from that of the Andonians in that Seresi and Saini claimed a state of mind influenced by Iglesias' assertion that the CIA was connected with the scheme. The Andonians merely pled ignorance of the source of the funds. The jury could believe either of these explanations without being required to convict other defendants as a result. Similarly, Vivas' defense, which was that the money was from legitimate sources did not necessarily conflict with Seresi's and Saini's defense, as they merely argued that, regardless of the source of the funds, they lacked criminal intent. Finally, Vivas' defense was not compromised by the Andonians defense, because the jury could have believed that the Andonians did not know or were deceived about the source of the funds without finding that Vivas was involved in criminal activity. *Cf. United States v. Ramirez*, 710 F.2d 535, 546 (9th Cir. 1983).

VI

Defendants contend that the district court erred in admitting the expert testimony of Special Agent Orton. The decision to admit expert testimony is committed to the discretion of the trial court, and will not be disturbed unless manifestly erroneous. *United States v. Kinsey*, 843 F.2d 383, 388 (9th Cir.), *cert. denied*, 487 U.S. 1223 (1988). "Erroneous admission of expert testimony is reversible if the admission more probably than not materially affected the verdict." *United States v. Binder*, 769 F.2d 595, 601-02 (9th Cir. 1985).

At trial, cooperating government witness Mario Tankazyan testified that a teenage courier delivered a box containing $325,000 to R.A.O.F., one of the currency collection points. When asked if the amount in the box was correct, the courier divided the $325,000 by 25, arrived at $13,000, and responded, "Yeah, its right." Agent Orton testified that between 1987 and 1988, the wholesale price of cocaine ranged from $11,000 to $20,000 per kilogram. The government introduced this evidence to supports its theory that the courier was delivering the proceeds of a sale of 25 kilograms of cocaine.

Defendants first argue that the district court failed to exercise its discretion and abdicated its role to the government. This argument is unfounded. The record amply reflects that the district court grappled with whether to admit Agent Orton's testimony and decided to do so because the circumstances of the courier's statement suggested a narcotics transaction.

The defendants also argue that the testimony was irrelevant.[4] They note that the courier never mentioned a narcotics transaction or indicated that he was familiar with the price of cocaine. They also state that the record contained evidence that the price of gold ranged from $12,731 to $14,660 per kilogram. They assert that the courier's calculation does not lead to the conclusion that he was more likely referring to the price of cocaine than to the price of gold.

These arguments are not persuasive. Evidence is relevant if it has any tendency to make the existence of a material fact more probable or less probable than if the evidence were excluded. Fed. R. Evid. 401. Agent Orton's testimony was relevant because it tended to show that the courier was

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[4]Vivas asserts that the evidence lacked "foundation." Properly characterized, his challenge is to the relevance of the evidence. Defendants do not challenge Agent Orton's qualifications.

calculating the price of a kilogram of cocaine to determine if the amount of money in the box represented the proceeds of a particular sale of 25 kilograms of cocaine. Such testimony is not rendered irrelevant because the courier's statements could also be subject to other interpretations. Indeed, the defendants introduced evidence of the price of gold to support their theory of the case.

The defendants also argue that Agent Orton's testimony was unfairly prejudicial, because, had it been excluded, the jury would not have had a basis to conclude that the financial transactions related to cocaine sales and could only have concluded that they related to gold sales. This argument lacks merit.

> The critical question is whether the probative value of relevant evidence was "substantially outweighed by the danger of unfair prejudice" or was "needless presentation of cumulative evidence." "Unfair prejudice," within the meaning of the rule, occurs when the evidence has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." It is evidence which "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case."

United states v. Skillman, 922 F.2d 1370, 1374 (9th Cir. 1990) (citations omitted), *cert. dismissed*, 112. S. Ct. 353 (1991). Testimony is not unfairly prejudicial merely because it tends to persuade the jury that the government's interpretation of the facts is more likely true than not. Agent Orton's testimony resulted in no unfair prejudice to defendants.

The defendants also argue that Agent Orton's opinion testimony was unfairly prejudicial. We have noted that the

trial court should not routinely admit opinions of law enforcement officers, which often carry an aura of special reliability and trustworthiness. *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988). In *Espinosa*, we upheld that admission of a law enforcement officer's testimony that a particular exchange was probably an exchange of narcotics for money, that "pay and owe" ledgers contained the names of cocaine buyers, and that the defendant was using a particular apartment as a "stash pad" for money and narcotics. *Id.* at 611-613. These types of concerns are not present here. Agent Orton's testimony was limited to issues related to the source, processing, and price of cocaine. He did not offer an opinion on whether the defendants were laundering the proceeds of narcotics trafficking. The district court did not abuse its discretion in admitting the testimony.

VII

Defendants argue that there was insufficient evidence to convict them of money laundering. They note that the government did not introduce any direct evidence of actual narcotics transactions. Rather, it relied solely on circumstantial evidence to prove that the defendants knew that they were laundering money generated by illegal narcotics transactions. In effect, the defendants ask us to hold that the absence of direct evidence of narcotics trafficking is fatal to a charge of money laundering. We decline the invitation.

We review the sufficiency of the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Skillman*, 922 F.2d at 1372. To prove money laundering, the government must show that

> the defendant conducted a financial transaction which involved proceeds of unlawful activity, that he knew

> that the property involved was proceeds of some form of unlawful activity, and that he *either* (1) 'intended to promote the carrying on of specified unlawful activity' (18 U.S.C. § 1956(a)(1)(A)(i)); or (2) knew that the transaction was designed in whole or in part 'to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity' (18 U.S.C. § 1956 (a) (1) (B)(i)).

United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991).

We have long since abandoned the distinction between direct and circumstantial evidence. *E.g., United States v. Poland*, 659 F.2d 884, 887 (9th Cir.), *cert. denied*, 454 U.S. 1059 (1981). Although there was no direct evidence of specific narcotics transactions, there was sufficient circumstantial evidence to tie the proceeds to drug trafficking and to allow the jury to infer knowledge on the part of all of the defendants, including, but not limited to the following:

(1) Cocaine originates in Colombia, where the "owners" of the funds were from;

(2) The funds were transferred to Cambio Italia and banks in Central and South America;

(3) The currency was delivered to the jewelry and gold businesses by young, Spanish-speaking men who used code names and numbers;

(4) The currency arrived in small bills in duffel bags, grocery bags, and boxes;

(5) A witness saw white powder on some of the currency and was told it came from someone having put the money next to drugs;

(6) A courier delivered $325,000 to a currency collection point, divided the amount by 25 to arrive at $13, 000, and, at

the relevant time, the wholesale price of cocaine ranged from $11,000 to $20,000;

(7) The defendants engaged in counter-surveillance types of activities, including relocating and renaming cash-collection shops, abandoning and hiding money, money counters, and ledgers when surveillance was detected, and discussing means of avoiding detection; and

(8) The defendants funneled, in 1988 alone, over $300,000,000 to banks in Central and South America.

The evidence was sufficient to allow the jury to find that the defendants engaged in illegal money laundering.

VIII

Defendants Seresi and Saini claim that the district court erred in giving an *Allen* charge to the jury. We review for abuse of discretion the trial court's jury instructions. *United States v. Cuozzo*, 962 F.2d 945, 951 (9th Cir.), *cert. denied*, 113 S. Ct. 475 (1992). In reviewing an *Allen* charge, "we consider whether the instruction, taken in its context, had a coercive effect." *Id.*

Seresi and Saini contend that the *Allen* charge was coercive, as indicated by the jury's repeated notes to the court requesting additional instruction and by the length of time the deliberations had continued prior to the *Allen* charge. *See United States v. Foster*, 711 F.2d 871, 884 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984). Contrary to defendants' assertions, these factors weigh in favor of the charge. The Clerk's record indicates the jury was working actively to reach verdicts, and the four days of deliberations after the *Allen* charge demonstrate that the jury was not deadlocked. See *Cuozzo*, 962 F.2d at 952 (noting that several hours of deliberation did not raise a suspicion of coercion). The additional four days of deliberations, given the length and complexity of the evidence, is not unusual.

The jury's ability to return verdicts of acquittal as well as guilt, coupled with its ultimate inability to reach a verdict on Count 1, indicate an absence of coercive effect.

IX

Defendants argue the district judge should have recused himself from sentencing due to his personal bias, arguing that his comments when accepting pleas from other defendants suggested impermissible bias. We review for abuse of discretion the district judge's denial of the motion to recuse. *United States v. Payne*, 944 F.2d 1458, 1476 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1598 (1992). To evaluate possible bias, we employ an objective test of "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Payne*, 944 F.2d at 1476.

The comments during his acceptance of guilty pleas, taken as a whole, indicate that the district judge had strong feelings about the crimes alleged, wanted to deter these types of crime from occurring in the future, and wanted to ensure that the defendants who were pleading guilty gave meaningful cooperation to the government. We do not agree that these statements demonstrate bias toward the defendants taking their case to trial. Knowledge obtained by the district judge during these pretrial proceedings does not require reversal. *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989).

X

Seresi, Saini, and the Andonians challenge their sentences under the United States Sentencing Guidelines. We review for clear error the factual findings underlying the sentence. *United States v. Burns*, 894 F.2d 334, 336 (9th Cir. 1990). We review de novo the district court's interpre-

tation of the guidelines. *United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1403 (1994).

Defendants challenge the district court's determination of the base offense level, the court's adjustments to the base offense levels, and the court's upward departure. They also argue that their sentences violate due process and equal protection principles.

A

Defendants argue that their base offense levels should have been based on U.S.S.G. § 2S1.2, rather than on § 2S1.1. This argument has no merit. § 2S1.1 applies if a defendant is convicted of money laundering pursuant to 18 U.S.C. § 1956, as these defendants were. The argument that the evidence did not prove the source of the funds was drug trafficking goes to the issue of the sufficiency of the evidence for purposes of conviction. The evidence was sufficient both for conviction and for determination of the base offense level.

B

The Andonians, Seresi, and Saini argue that they should not have received an adjustment to their base offense levels on the ground that over $300 million were laundered, because they were not each personally responsible for laundering this entire sum.

§ 2S1.1(b)(2)(N) provides for an adjustment of thirteen levels if the amount of money laundered was over $100 million. The government established that the total amount of funds laundered during the period of time alleged in the indictment exceeded $300 million. The government argues that under U.S.S.G. § 1B1.3(a)(1) and general principles of coconspirator liability, each defendant is liable for all of

the funds involved. *See United States v. Changa*, 901 F.2d 741, 744 (9th Cir. 1990).

We have held, however, that § 1B1.3

> is explicit in making a distinction among members of a conspiracy in terms of "the scope" of the activity. This approach distinguishes the Guidelines from the general harsh law of conspiracy that a conspirator is bound by all that has gone on before in the conspiracy. Under the Guidelines, each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.

United States v. Petty, 992 F.2d 887, 890 (9th Cir.) (citations and quotations omitted), *cert. denied,* 114 S. Ct. 1015 (1993). Petty requires that the district court determine both the quantity of drugs distributed that were reasonably foreseeable by each defendant and the quantity of drugs distributed that were within the scope of the particular agreement that each defendant entered. *Id.* at 891.

We are aware of no specific findings by the district court as to the scope of each defendant's agreement or as to the reasonable foreseeability to each defendant of the amount of money laundered. As to the Andonians, the record demonstrates that the entire $316 million was funneled through their gold exchange business. However, we cannot say that, with respect to defendants Seresi and Saini, who were not personally involved in handling all of the funds, the lack of specific findings is harmless. We therefore remand to the district court for appropriate findings and, if necessary, resentencing consistent with those findings.

C

Defendants also argue that they should not have received adjustments for their roles as organizers (Nazareth Andonian) or managers (Vahe Andonian and Seresi). U.S.S.G. §§ 3B1.1(a) and (b) provide for a four-level adjustment based on the defendant's role as an organizer or leader and a three-level adjustment for the defendant's role as a manager or supervisor. We review for clear error district court's finding that these defendants were organizers or managers. *United States v. Sanchez*, 908 F.2d 1443, 1449 (9th Cir. 1990).

The record reflects that Nazareth Andonian made significant decisions with respect to the trading of gold. The Andonians' business played a central role in processing the currency to buy gold, and they exercised authority over employees of several businesses. Seresi was an agent of Vivas, making decisions about how to continue the money-laundering operation in the face of numerous obstacles. It is irrelevant for purposes of the adjustment that many of those supervised by the defendants were acquitted. U.S.S.G. § 3B1.1, comment. (n.1).

D

Defendants Vahe Andonian, Seresi, and Saini argue that their sentences should not have been adjusted for obstruction of justice. § 3C1.1 provides for a two-level adjustment for the willful obstruction or attempted obstruction of justice. The district court found that Vahe Andonian perjured himself at trial. Andonian testified that he went to New York in May of 1988 for business reasons unrelated to recovering funds which had been abandoned by a coconspirator. This testimony was contradicted both by Andonian's asserted business contact, and by other witnesses who testified that Andonian went to New York to

retrieve the funds. The district court did not clearly err in determining that Andonian committed perjury.

The district court found that Seresi instructed Saini to destroy evidence and that both defendants committed perjury. The destruction of records alone supports the district court's finding. U.S.S.G. § 3C1.1(3)(1). The district court did not clearly err in determining that Seresi and Saini perjured themselves at trial.

E

Defendants argue that the district court erred in departing upward from the guideline range. We review district court's decision to depart from the guidelines under a three-part test established in *United States v. Lira-Barraza*, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc); *United States v. Cruz-Ventura*, 979 F.2d 146, 148 (9th Cir. 1992).

The district court departed upward partly because U.S.S.G. § 2S1.1(b)(2), which provides for an increase of thirteen levels where the amount of money laundered exceeds $100 million, does not provide for a greater increase for substantially larger sums. If the Commission had intended a scale that went beyond $100 million, it would have created a formula by which the sentencing court could calculate the number of levels to increase the base offense level. Instead, the Commission created a scale ending in "[m]ore than $100,000,000." U.S.S.G. § 2S1.1(b)(2)(N). The district court's statement that "[t]hese defendants engaged in conduct which clearly was not contemplated by the drafters" is unfounded.

Nevertheless, the district court's one-level adjustment was justified on another basis. The district court also based the one-level adjustment on the sophistication and scope of the money laundering organization. The district court did not err in its finding that this money laundering operation

was vast and sophisticated. This finding supports the one-level adjustment. *See United States v. Shields*, 939 F.2d 780, 783 (9th Cir. 1991).

F

Defendants challenge their sentences on constitutional grounds. Although the sentences are extreme, they do not violate the Constitution. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1990) (mandatory life sentence for drug crime not unconstitutional); *United States v. Litteral*, 910 F.2d 547, 551-553 (9th Cir. 1990) (rejecting challenges to guidelines sentence based on equal protection and due process).

X

The convictions of the defendants are affirmed. The sentences of Vivas, Vahe and Nazareth Andonian are affirmed. We remand to the district court for further findings and for resentencing, if necessary, of Seresi and Saini.

AFFIRMED IN PART AND REMANDED.

APPENDIX C

EXCERPTS OF TRANSCRIPT OF NINTH CIRCUIT ORAL ARGUMENT

J. Trott: I'd like to ask you a few questions about the rule of specialty or specialty, however it's pronounced. It appears that you have a treaty, you know what the treaty says. Essentially the treaty in the law prohibits prosecution on anything other than offenses for which the person has been extradited. Question is what that means. But what you know had happened in this case is that Mr. Vivas was extradited, there were certain papers that were identified offenses, times, dates, places and everything else, and then he got back and there was a superseding indictment that added quite a number of counts that were never specified in the original extradition process. There used to be a rule in the Office of International Affairs when I was there that you did not supersede once you went for extradition, that you got your case completely together because of the problems with the rule of speciality. Nevertheless, there's a possibility in the treaty that you could have gone back to the requested country and asked for permission. Now what I need to know from you is, on many of these counts, how do we get around the rule of speciality that says you can only prosecute for the offenses for which the person was extradited.

* * *

Gov't: Your Honor, the answer to that is the rule of specialty hasn't been construed to require to interpret offenses to mean specific counts.

J. Trott: Well, maybe it will be now. Why shouldn't it be? I mean, isn't there a good reason to draw a bright line rule here and to tell the Government, if you're going to tell a foreign country that somebody is going to be prosecuted for a robbery on Friday, October 30th, at such and such a liquor store, that when you get that person back you must prose-

cute for that crime? In the alternative you must ask the other government for permission if you plan to change the calculus. Why shouldn't there be a bright line? Why isn't it extremely easy for the government to comply with, and why doesn't it protect both people extradited into this country and Americans extradited abroad to face charges in other countries? I don't — tell me why there's a bad reason to have a bright line rule that says offenses for which a person is extradited means exactly that, and we look at your, the government's paperwork, to decide precisely what those are and anything that's a variance is no good. I'm talking a lot now, but if you tried to convict Mr. Vivas for the offenses that were added in the superseding indictment on the basis of the first indictment, many of them you couldn't do that, could you, because there'd be a variance.

Gov't: I would submit there would not have been, Your Honor.

S.Trott: You mean you could use the original indictment and convict him of the substantive counts that were added in the superseding indictment?

Gov't: No, Your Honor, I would agree with the Court. . . .

S.Trott: Alright. Why not? Why couldn't you? Because of the rule of variance. Now if that's true, then why aren't all of those fatally defective under the rule of speciality? If you couldn't convict him on that first charging document, why doesn't the rule of speciality lock you out on the new ones?

Gov't: Your Honor, because the rule of variance and the rule of specialty arise from very different concerns. If a rule of variance arises from the concern that a defendant has a right to be tried and convicted only on those charges that have been returned by a grand jury, conversely, the rule of specialty speaks only to the concerns of the extraditing country. Defendant will recognize that while those concerns

or potential objections can be raised by a defendant, they are not the concerns of the defendant. They are the concerns of the extraditing country.

S.Trott: You brush over very rapidly that part of the treaty that says that the individual involved can raise these concerns and you have a treaty that says a person extradited under the present treaty shall not, that's an absolute prohibition, be tried for an offense other than that for which the extradition has been granted.

Gov't: Absolutely, Your Honor. And that is a phrase that appears in virtually extradition treaty that this country has and the way that the courts have uniformly interpreted that has been two-fold, under which both prongs, this case, would fit, and would satisfy the rule of specialty. One is that the defendant cannot be tried for a different statutory offense than that for which he was extradited. Clearly that was done here. Secondly, and alternatively, the courts have said, well if not based on the same statutory violation, then certainly it must be based on the same set of facts that were presented to the extraditing country and that indeed is undisputed by the defendant here. I would also point out that the nature —

J. Trott: Same set of facts?

Gov't: The same set of facts that were presented to the extraditing country.

J. Trott: Alright. Be explicit. What do you mean by set of facts?

Gov't: Well, for example, in this case. There were affidavits that were submitted in support of the extradition request that sets forth generally the government's evidence at that time that showed that defendant Vivas was involved in a drug money laundering conspiracy. I would point out that the Uruguayan authorities specifically rejected defendant Vivas' claim that they had to see the specific shipping

documents and the specific banking documents that supported the substantive counts. There is language in the extraditing order that speaks to the issue of the only question in terms of whether they need to see further evidence is whether or not more in essence there is what they call the smoke of good law, whether there is probable cause to believe that the offenses occurred. They were not concerned with the —

J. Trott: Which extraditing order are you talking about now? Is it in the excerpt of record?

Gov't: Your Honor, I don't believe it has been included in the excerpts of record.

J. Trott: Is there any reason why it's not in the excerpts?

Gov't: Oversight, Your Honor, and again I would be happy if the defendant Vivas is unable to do so, to supplement the government's excerpt to include the specific order that I'm referring to. The order can also can be found there in the related case that was decided by this court concerning defendant Vivas' interlocutory appeal under the rule of specialty and that supplied all of the papers in connection with defendant Vivas' extradition . . .

* * *

J. Trott: See, we have different problems here. You're trying to win your case, and we're trying to write the law of the Circuit and establish a neutral principle that will decide all of the speciality cases. And this is — everything's global now, we're going to have a lot of these cases. And we're going to have to be able to tell people clearly what the rule is. And I'm afraid we're going to get some sloppy rule called close enough for the rule of speciality where we're dealing with sets of facts and things like that and we're going to be in digging around and interpreting all of this junk and we're always going to be up on pre-trial appeals that won't raise

issues, and then post-trial messes and things like that, so I'm, I'm telling you that my thinking is, just sitting here by myself, is that we ought to have a pretty bright line rule and hold you to your documentation. Why is that wrong? You see now, it may — you may lose this case by that rule, but why is that a bad rule? Tell me why that's a bad rule. To hold you to your documentation?

Gov't: Your Honor, it is — perhaps not — whether or not it's a bad rule, is it is clear break from the way that the courts in this country —

J. Trott: Not in this Circuit. What's the rule in this Circuit?

Gov't: The rule in — there appears to be some disagreement as to what the law requires in this Circuit, because I would point to Judge Beezer's opinion in the *Cuevas* case which pointed out that the rule of specialty requires, or it looks to a determination of whether or not the extraditing country would consider that the defendant was tried for acts independent from those on which he was extradited. Now, I'd note the *Khan* decision, which contains the language that conflicts with that, but I would also look to the facts of the —

J. Trott: See, the language of *Khan* decision somewhat conflicts with that, doesn't it?

Gov't: Absolutely.

J. Trott: So we're — see — our job is to try to harmonize all this and come out and let people know where they stand so that you won't extradite somebody until you're ready to try your case, and then once they're extradited we won't have this problem. And what's, what — go back again — what is the problem with holding you to your documentation, and the documentation, especially in connection with this treaty, that says only for the offenses for which a person

is extradited? Why shouldn't we hold you to your documentation?

Gov't: First of all, Your Honor, there is no indication that in executing the treaty that either party contemplated that offenses was going to be read as meaning specific counts and the specific substantive counts.

J. Trott: Well, I can tell you from personal knowledge that's not true, but I'm going outside the record.

Gov't: Well, I would note for example that the treaty refers to offenses in the context also of a defendant should not be — shall only be extradited for the following offenses, listing a set of statutory offenses which are recognizable under both countries, or by both countries, and also recognizable under the treaty.

J. Trott: That's a different issue.

Gov't: But I would note that the same language is used and the courts have consistently construed the term offense within the context of that same limiting language along those lines. They have also looked to the language which indeed in this case, the Uruguarian courts cite in their extraditing order — extradition.

J. Trott: You're giving me history and I still, I'm, I'm, you know, I want to let you know where I am so you get me off of it. What's the problem with the rule that holds you to your documentation with respect to this specific language? If you would extradite him for offense A on day B, here's the facts then try him or else use the treaty and go back and say, we'd like to move it over and come up with some different substantive counts. Do you have any objection? They say no. Boom. No issue. It's so simple that I think it suggests that it ought to be the law.

Gov't: It is indeed simple, Your Honor, and clearly had we done that, had we felt that the whole law required us to do that, we would not be here having this discussion today.

J. Trott: Doesn't the Office of International Affairs tell anybody anymore, don't supersede once you extradite?

Gov't: No Your Honor, I would submit that they don't because the law hasn't required that and has not taken such a narrow construction. I would also point out that what the court suggests, that is, holding the government to essentially a formalistic interpretation of the treaty is not consistent with what the country itself said — what the Uruguarian authorities said themself in their own extraditing order.

* * *

J. Trott: So the problem with this is that every case then becomes a specific case. I mean, how far, how wide can you go when you say set of facts? What if you have somebody in a whole series of take-over bank robberies and you just decided to throw in an additional take-over bank robbery on a different date, a different location, a different place. Your argument would then be well, these crimes are both included in the treaty, robbery on both sides of the thing, and the facts we talked about take-over bank robberies and once we got the guy back we just added another one, because here's another one. Would your rule cover something like that? What are the limits to it? We have to know what the limits are so we can let people know so they can order their affairs accordingly. Set of facts. To me, I don't know what the limits are to that. Would it encompass a different bank robbery because somebody's been involved in a series of bank robberies? How about the murders of witnesses in a case? Murder witness one, murder witness two, you get them back, supersede, add a murder witness three, would that be good enough?

Gov't: Your Honor, in that case one can certainly maintain that it was not the same set of facts that was presented.

J. Trott: Why isn't it the same set of facts? Here you talk about a big money laundering thing, and now we've got a conspiracy to kill all the witnesses in a case. One and two are dead, and you find out when you get them back, oh now we've got three. See, why isn't that the same set of facts? One conspiracy to kill all the witnesses in one case.

Gov't: Well, Your Honor, if the court —

J. Trott: Same hit man.

Gov't: If a court had been presented with the fact that said these are — that the evidence supported the — the evidence that was presented to the extraditing country indeed supported the facts on which the defendant was charged and indeed what the extraditing order made clear was that the court understood that the case that was being prosecuted was a case to murder all the witnesses, then the rule of specialty could under those circumstances, accommodate that.

J. Trott: So we have a wrangle in every case where you could easily go back and get permission and a fight over whether the set of facts — that'll be the test, whether the set of facts is the same. We'll have a fight in every case whether the set of facts is the same.

Gov't: Well, Your Honor, I would submit we haven't had fights in every case as to what [inaudible] —

J. Trott: We have one here.

Nos. 91-50622, 91-50623, 91-50624, 91-50625, 91-50626

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

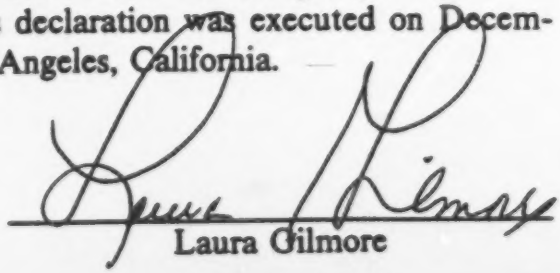
NAZARETH ANDONIAN, et al.,
Defendants-Appellants.

DECLARATION OF LAURA GILMORE IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

I, Laura Gilmore, declare as follows:

I am secretary to counsel for petitioner Raul Vivas in the action entitled *United States v. Andonian, et al.*, Case Nos. 91-50622-26. I do hereby declare and certify under penalty of perjury that I have transcribed portions of the aforementioned audio tape of the oral argument which was duly recorded in the Ninth Circuit Court of Appeals on November 1, 1993, and that the foregoing pages comprise a true, correct and accurate transcription of a portion of the aforementioned tape as I heard it.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on December 15, 1994 at Los Angeles, California.



Laura Gilmore

APPENDIX D-1

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 10850

EXTRADITION

Treaty Between the
UNITED STATES OF AMERICA
and URUGUAY

Signed at Washington April 6, 1973

ARTICLE 13

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

1. If, upon being released, he remains in the territory of the requesting Party for more than thirty days counting from the date his release was granted; or
2. When, having left the territory of the requesting Party after his extradition, he has voluntarily returned to it;
3. When the requested Party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted or to his extradition to a third State provided such other offense is covered by Article 2.

For the purposes of subparagraphs 1 and 2 of this Article, the person extradited must be formally advised at the time he is released in the requesting Party of the possible consequences if he remains in the territory of that Party.

The stipulations of subparagraphs 1, 2 and 3 of this Article shall not apply to offenses committed after the extradition.